No. 17-7505

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

VERNON MADISON, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MOBILE COUNTY CIRCUIT COURT

REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

It is undisputed that as a result of multiple, severe strokes over the last several years, Vernon Madison suffers from vascular dementia and has no memory of the commission of the offense for which the State is scheduled to execute him on January 25, 2018. See Madison v. Comm'r., Ala. Dep't. of Corr., 851 F.3d 1173, 1185 (11th Cir. 2017) ("[I]t is uncontroverted that, due to his mental condition, Mr. Madison has no memory of his capital offense."). The condition from which Mr. Madison suffers is irreversible and degenerative: his physical and mental condition has already and will continue to progressively decline.[1] More importantly, the expert upon whom this Court and the circuit court previously relied in this case has been suspended from the practice of psychology after his narcotics addiction led him to forge prescriptions for illegal pills (including one incident occurring just four days after Mr. Madison's 2016 competency hearing) and eventually into drug rehab.

It is also undisputed that a unique provision in Alabama law precludes any state appellate review of the issue of whether a death row prisoner is competent to be executed under the Eighth Amendment. This Court has

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[1] See Constantino Iadecola, The Pathobiology of Vascular Dementia, Neuron 1 (Nov. 20, 2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3842016/pdf/nihms531326.pdf (dementia is "an irreversible condition resulting in progressive cognitive decline").

recognized that the reliability, fairness and constitutionality of the death penalty turns on reviewability. Certainly the question of whether the mental state of a prisoner renders him incompetent to be executed raises a critical issue meriting this Court's review.

In its brief in opposition, the State of Alabama does not dispute these facts and its arguments should be rejected and certiorari granted to consider the important question presented in this case: Does the Eight Amendment permit the State to execute a prisoner whose disability leaves him without memory of the commission of a capital offense?

First, the State's contention that the issue presented by Mr. Madison is foreclosed under "law of the case" doctrine because Mr. Madison previously challenged his competency to be executed in May, 2016, is unavailing. State's Resp't's Br. Opp'n. 7. The last court to address the *merits* of Mr. Madison's competency claim in the previous competency litigation found that as a matter of fact and law, Vernon Madison *is* incompetent and that his execution is therefore prohibited by the Eighth Amendment. See Madison, 851 F.3d at 1190 ("We therefore conclude that Mr. Madison is incompetent to be executed."); id. (Jordan, J., dissenting) ("I believe that Vernon Madison is currently incompetent. I therefore do not think that Alabama can, consistent with the Constitution, execute him . . . .").

Moreover, the challenge in this case is to Mr. Madison's current competency to be executed, which arose when the State scheduled Mr. Madison's execution for January 25, 2018. Panetti v. Quarterman, 551 U.S. 930, 947 (2007) ("[C]laims of incompetency to be executed remain unripe at early stages of the proceedings."). The evidence bearing on this question consists both of the previously submitted evidence documenting Mr. Madison's previous strokes, encephalomacia, small vessel ischemia, and diagnosis of vascular dementia, see Panetti, 551 U.S. at 950 (relying on "extensive evidence of mental dysfunction considered in earlier legal proceedings" as evidence demonstrating threshold showing of insanity), as well as the fact that as a result of this degenerative disease, Mr. Madison continues to decline. These assertions are not in dispute.

To the extent that the State labels recent evidence about the court-appointed expert, Dr. Kirkland, a "red herring," Resp't's Br. Opp'n. 16, the State misunderstands and mischaracterizes Mr. Madison's contentions. The evidence of Dr. Kirkland's drug addiction, suspension from practice and felony charges was relevant not just to impeaching his opinion, see Charles Gamble, McElroy's Alabama Evidence, § 141.01(3) (6th ed. 2009) (witness's substance use relevant and admissible concerning inability to observe, remember or narrate), but calls into question the entire basis for the circuit court's determination that Mr. Madison was competent to be executed. Given the heightened importance of

expert evaluations and testimony in the context of competency-to-be-executed claims, such evidence is critically and obviously important. Panetti, 551 U.S. at 962.

The State also argues that certiorari is inappropriate because Mr. Madison "invited error" by filing a challenge to his competency to be executed pursuant to Alabama Code Section 15-16-23. The State incorrectly argues that Mr. Madison's claim actualiy is a "non-insanity Eighth Amendment claim" and that as a result he should have filed his petition in a different forum. Resp't's Br. Opp'n. 11-12. This argument is not only unavailing, but it serves to reinforce the appropriateness of certiorari in this case.

Alabama law provides only one vehicle for Mr. Madison to challenge his competence to be executed (whatever the origin of the incompetence): Alabama Code Section 15-16-23.[2] There is no right to appeal the denial of these claims, Weeks v. State, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995) , and federal habeas review is not available for a merits determination without first meeting

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[2] Rule 32 of the Alabama Rules of Criminal Procedure, cited by the State, provides no basis for relief on claims of incompetence to be executed as such claims do not challenge the underlying conviction or sentence, see Ala. R. Crim. P. 32.1(a), (c), (e), the jurisdiction of the trial court, see Ala. R. Crim. P. 32.1(b), or an unlawful detainment despite the expiration of a sentence, see Ala. R. Crim. P. 32.1(d). The only question raised by a prisoner's competency-to-be-executed challenge is "not whether, but when, his execution may take place." Ford v. Wainwright, 477 U.S. 399, 425 (1986) (Powell, J., concurring in part and concurring in the judgment).

the "demanding standard" of the AEDPA, Dunn v. Madison, 138 S. Ct. 9, 11 (2017). Given that no state appellate court is permitted to review the critical question of competency in this case, and given the limited opportunity this Court has to review such claims "outside of the AEDPA context," certiorari should be granted to review the state circuit's ruling in this case. Id. at 12.

Finally, the State makes one last-ditch argument: that certiorari is not appropriate because "[t]he idea that the inability to recall an event precludes a rational understanding of that event, or its consequences, is absurd." Resp't's Br. Opp'n. 15. But Mr. Madison's challenge is not just an "absurd idea," but rather a claim that his undisputed DSM-5 diagnosis of vascular dementia and related memory impairments render him unable to recall numerous events including the commission of the offense for which he is to be executed. This claim is supported by uncontradicted testimony from Dr. Goff, formed the basis for a finding of incompetence by all three members of the Eleventh Circuit, and is in fact a "substantial question not yet addressed by the Court." Dunn, 138 S. Ct. at 12 (Ginsburg, J., concurring).

Mr. Madison respectfully requests that this Court grant certiorari and stay his scheduled execution in order to address the critical question of whether executing Mr. Madison violates evolving standards of decency and the Eighth Amendment's prohibition against cruel and unusual punishment.

Respectfully Submitted,

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